Filed 11/23/09 Walsh v. City and County of San Francisco CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

DENNIS WALSH, **Plaintiff and Appellant,** **v.** **CITY AND COUNTY OF SAN FRANCISCO,** **Defendant and Respondent.**	**A123667** **(City & County of San Francisco Super. Ct. No. CPF-06-506799)**

Appellant Dennis Walsh (Walsh), employed by respondent City and County of San Francisco (City) as a deputy in the Sheriff's Department (Department), appeals from the trial court's judgment denying his petition for writ of mandate, which alleged that the Department deprived him of due process of law under the Fourteenth Amendment to the United States Constitution in placing him on compulsory sick leave.[1] We affirm the judgment, concluding that the Department provided adequate process before placing Walsh on compulsory leave.

BACKGROUND

On September 13, 2004, San Francisco police officers arrested Walsh for driving under the influence of alcohol. Walsh told the arresting officers that he had consumed

[1] The Department was named in Walsh's petition for writ of mandate, but, as the Department is part of the City and County of San Francisco, only the City appears as a respondent on appeal.

"12 shots and 6 beers," had last slept three days before, and "must have passed out while driving." The police handed Walsh over to sheriff's deputies at the jail.

At the jail, Walsh cried "uncontrollably" and made "fatalistic" statements. The sheriff's deputies took him to a hospital for possible psychiatric evaluation. The deputies decided to take Walsh home from the hospital after he denied being suicidal, but as they left he attempted to get away and had to be restrained after a violent struggle. Walsh was committed for psychiatric evaluation under Welfare and Institutions Code section 5150.[2]

A person committed under Welfare and Institutions Code section 5150 may not possess firearms for a period of five years, unless he obtains a court order lifting the prohibition. (Welf. & Inst. Code, § 8103, subd. (f)(1).) After he was released, Walsh retained attorney William Fazio (Fazio). Because persons who are prohibited from carrying firearms may not be employed as sheriff's deputies, Fazio sought to obtain an order lifting the firearms prohibition. In late September or early October 2004, Fazio contacted counsel for the Department, James Harrigan (Harrigan), and asked that Walsh be placed on a leave of absence while Fazio sought to resolve the firearms issue. The Department agreed.

Walsh pled no contest to a charge of driving under the influence on November 8, 2004. On November 19, Walsh obtained a doctor's opinion that he was "not a risk in terms of possessing a weapon." On March 3, 2005, Harrigan informed Fazio in writing that Walsh could return to work only when he became legally able to carry firearms, passed a fitness for duty examination, and the Department's Investigative Services Unit conducted an investigation. Harrigan told Fazio the fitness for duty examination was necessary because Walsh's arrest and psychiatric commitment put into question Walsh's capacity to work as a deputy.

---

[2] Welfare and Institutions Code section 5150 provides in part: "When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer . . . may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation."

On March 30, 2005, Walsh obtained a court order lifting the firearms prohibition. In May 2005, Walsh submitted a written request to extend his leave to July 1, 2005.

In early April 2005, the Department requested that the City's Department of Human Resources (DHR) schedule Walsh for a fitness for duty examination. The examination took place on April 25 with Dr. Stephen Born (Born). Born concluded Walsh had a "significant problem with alcohol abuse" that would affect Walsh's ability to serve as a deputy. Born referred Walsh to another doctor for a second opinion; the second doctor also concluded Walsh's alcohol abuse rendered him unfit to work as a deputy. Born's ultimate conclusion was that Walsh was unfit for duty and should undergo alcohol dependency treatment. On June 27, 2005, after meeting with Walsh to discuss his findings, Born notified the DHR that Walsh was unfit for duty.

On July 8, 2005, the Department notified Walsh that, due to the results of the medical examinations, he could not return to work until he completed the recommended alcohol dependency treatment and passed a subsequent fitness for duty examination. The Department took the position that Walsh was on compulsory sick leave following the end of his voluntary leave of absence on July 1, 2005.

In late July 2005, Harrigan explained to Fazio that Walsh could choose to be reexamined or to appeal the medical disqualification to the DHR, and he directed Fazio to the applicable civil service rules.

In November 2005, a union representative requested a fitness for duty reexamination for Walsh. When Walsh saw Born on January 30, 2006, Walsh presented a note from his personal physician stating that he was in "excellent physical health." Born notified the DHR that he had not changed his opinion that Walsh was unfit for duty.

Walsh did not file an appeal with the DHR as permitted by the civil service rules.[3] In November 2006, Walsh filed a petition for writ of mandate alleging, among other

---

[3] Section 116.5 of the City's Civil Service Commission Rules provides in part: "A person who has been medically rejected following re-examination may appeal the rejection to the Human Resources Director within ten (10) days of the date of the notice of rejection following medical re-examination. . . ."

things, violation of his right to due process under the federal Constitution.[4] Following a hearing, the trial court found that Walsh "failed to meet his burdens of proof and persuasion as to each of" his causes of action. The court denied the petition for writ of mandate with prejudice. This appeal followed.

DISCUSSION

I. *Walsh Received Adequate Process Before He Was Placed on Leave*

Walsh contends the trial court erred in rejecting his cause of action for violation of the federal due process clause. We review de novo the trial court's conclusion of law that the Department's predeprivation procedures did not violate Walsh's due process rights. In deciding this issue, "[w]e accept as conclusive the trial court's factual findings if supported by substantial evidence. [Citation.]" (*Menge v. Reed* (2000) 84 Cal.App.4th 1134, 1139.)

The government cannot deprive individuals of a "property interest" within the meaning of the due process clause of the Fourteenth Amendment to the United States Constitution without procedural due process. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 332 (*Mathews*).) A procedural due process claim has three elements: "(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; (3) lack of process." (*Portman v. County of Santa Clara* (9th Cir. 1993) 995 F.2d 898, 904.) In the present case, there is no dispute that Walsh had a protected interest in the continuation of his employment and that he was deprived of that interest when he was placed on compulsory sick leave. (See *Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95, 109-112 (*Bostean*).)[5] The issue in dispute is the adequacy of the process afforded to Walsh.

---

[4] Walsh fails to present reasoned argument with citations to authority that the trial court's rejection of any of his other causes of action provides a basis for reversal. Any such contention has been forfeited. (*In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 690, fn. 18; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*).)

[5] The parties do dispute the date of the deprivation. Walsh contends the deprivation occurred on September 13, 2004, immediately following his arrest, because the Department subsequently asked him to complete a leave request form. However,

The parties agree this case should be decided under the test articulated in *Mathews*. *Mathews* explained that " '[d]ue process is flexible and calls for such procedural protections as the particular situation demands.' " (*Mathews, supra*, 424 U.S. at p. 334.) The Supreme Court set out three factors that courts should balance to determine if procedures are constitutionally sufficient: "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Id.* at p. 335; see also *Bostean, supra*, 63 Cal.App.4th at p. 113.) As the Supreme Court explained in *Gilbert v. Homar* (1997) 520 U.S. 924, 930-931 (*Gilbert*), " 'An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.' " (See also *Bostean*, at pp. 112-113.)

Walsh has a " 'significant private interest in the uninterrupted receipt of his paycheck.' " (*Bostean, supra*, 63 Cal.App.4th at p. 113, quoting *Gilbert, supra*, 520 U.S. at p. 932.) Although Walsh was already on leave without pay at the time the leave became involuntary, each additional day of unpaid leave was significant to him. On the other hand, the Department had a significant interest in refusing to permit Walsh to return to work without medical clearance. He was arrested for drunk driving and he told the arresting deputy he had consumed 18 drinks. He appeared so mentally unstable that he was committed for psychiatric observation. The duties of sheriff's deputies "include operating the City . . . jails and other custodial facilities, transporting prisoners, providing security in the courts and other public buildings, executing criminal and civil warrants,

---

declarations in the record from the Department's counsel, Harrigan, and then counsel for plaintiff, Fazio, show that Fazio requested that Walsh be placed on leave of absence. Accordingly, substantial evidence supports the trial court's implied finding that the deprivation occurred on July 1, 2005, when Walsh's voluntary leave ended.

and providing police services as needed." The Department had good reason to ensure that whatever problems led to Walsh's arrest and psychiatric commitment had been resolved before returning him to his duties, where substance abuse or mental instability could have threatened the safety of his coworkers, prisoners, and the public. (Cf. *Bostean*, at p. 114 ["There is no evidence in the instant record that Bostean's remaining on his job posed any immediate threat to his health and safety or that of any other person."].)

The final *Mathews* factor is the risk of *erroneous* deprivation of a protected interest due to the particular procedures used. A comparison to *Bostean* is instructive. There, the plaintiff, a school district employee suffering from diabetes and epilepsy, was placed on involuntary illness leave without pay. (*Bostean*, *supra*, 63 Cal.App.4th at pp. 99-101.) The Court of Appeal concluded the employer's process resulting in imposition of the leave created significant risk of erroneous deprivation of the plaintiff's employment arising from "miscommunication, misinterpretation, and factual error." (*Id.* at p. 115.) In that case, the plaintiff's supervisor made inquiries to the plaintiff's physician, but the plaintiff was not notified the inquiries were "preliminary to an involuntary illness leave of absence," rather than to efforts to accommodate his restrictions or change his work conditions. (*Id.* at p. 114.) That is, the plaintiff was not "informed of the true issues at stake and the purposes for, and consequences of, the medical reports." (*Id.* at 116.) Moreover, the plaintiff had no predeprivation opportunity to be heard because he was told that his employer would be relying on the medical information to place him on leave on the last workday before the leave started. (*Id.* at p. 115.) The Court of Appeal concluded the procedures the employer used were not reliable for "developing reasonable grounds to support the imposition of an involuntary illness leave of absence without prior notice and hearing." (*Id.* at p. 116.)

Here, in contrast, Walsh's counsel was informed in writing in early March 2005, even before Walsh's firearm restriction had been lifted, that Walsh would need to show his medical fitness to return to duty. Accordingly, Walsh knew at least one and one-half months before the examination that the purpose of the examination was to test his

readiness to return to work. Although the letters from the Department did not expressly state that the concern related to substance abuse, it was obvious that would be an issue in the examination, because the leave arose following a drunk driving incident in which Walsh admitted he consumed 18 drinks. Moreover, because the imposition of involuntary leave followed medical examinations by two doctors, and Walsh met with Born afterwards to discuss the doctor's findings before they were communicated to the DHR, there was some assurance that there was reasonable basis for the compulsory sick leave. Finally, Walsh's psychiatric commitment and November 2004 no contest plea to driving under the influence provided additional assurance there was reasonable basis to place Walsh on compulsory sick leave. (See *Gilbert*, *supra*, 520 U.S. at p. 934.)

The facts of this case bear some similarity to those in *Gilbert*. There, a police officer employed by a state university was immediately suspended after he was charged with felony possession of marijuana. (*Gilbert*, *supra*, 520 U.S. at pp. 926-927.) In balancing the *Mathews* factors, the Supreme Court held that "the State has a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers." (*Gilbert*, at p. 932.) Moreover, in addressing the issue of the risk of an erroneous deprivation, which the court characterized as the factor most important to resolution of the case (*id.* at p. 933), the court stated that the criminal procedures of arrest and formal charge by complaint "serve to assure that the state employer's decision to suspend the employee is not 'baseless or unwarranted,' . . . in that an independent third party has determined that there is probable cause to believe the employee committed a serious crime." (*Id.* at p. 934; see also *Bostean*, *supra*, 63 Cal.App.4th at p. 117 [distinguishing *Gilbert*].)

The facts in the present case also bear some similarities to those in *Ganley v. County of San Mateo* (N.D.Cal. Dec. 20, 2007, C06-3923 TEH) 2007 U.S.Dist. Lexis 93489. There, a county correctional officer was placed on involuntary medical leave due to physical limitations that restricted her to light duty work. (*Id.*, p. *1.) The district court concluded the employee had received due process because, although she had "no

formal 'fitness for duty' examination," she was aware at the time she was examined by her personal doctor and by the county's physician that the examinations were for the purpose of determining the extent of her disability, and she had an opportunity to protest the county's decision to place her on leave. (*Id.*, pp. *29-*30.) Here, Walsh *did* have a formal fitness for duty examination, he knew his return to work was dependent on the doctor's findings, and he had an opportunity to discuss the findings before notification was sent to the DHR and Department.

We conclude Walsh received constitutionally adequate predeprivation process before being placed on compulsory sick leave.[6]

II. *Any Error as to Discovery of Medical Records Provides No Basis for Reversal*

During the litigation below, the City subpoenaed medical records concerning Walsh, including the records of the doctors who performed the fitness for duty examinations. Walsh moved to quash the subpoenas. A commissioner of the superior court denied the motion to quash as to the records of the doctors who performed the fitness for duty examinations, but granted the motion in other respects. Walsh subsequently moved to quash document and deposition subpoenas directed to the doctors, arguing compelled production would violate his right to privacy and the physician-patient privilege. The motion was in large part denied.

---

6 The Department also made postdeprivation processes available to Walsh. It informed Walsh on July 8, 2005, that he could obtain a reexamination, and he ultimately did obtain a reexamination. The Department's counsel also informed Walsh's then counsel, Fazio, that Walsh had the right to administratively appeal the result of the medical examination. On appeal, Walsh presents no reasoned argument with citations to authority that the postdeprivation processes were constitutionally inadequate or inadequate to satisfy the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). Any such contentions have been forfeited. (*In re Groundwater Cases*, *supra*, 154 Cal.App.4th at p. 690, fn. 18; *Badie, supra*, 67 Cal.App.4th at pp. 784-785.) Accordingly, we need not address the City's argument that Walsh *waived* his claim of violation of due process because he failed to take advantage of the available postdeprivation processes. We do point out that the Department could have provided Walsh much better notice regarding his appeal rights; the Department is well-advised to do so in the future with similarly situated employees. (See *Ganley v. County of San Mateo, supra*, 2007 WL 4554318, p. *32.)

On appeal, Walsh contends the commissioner erred in denying his motions to quash. However, even assuming Walsh could show error, the rulings are only grounds for reversal if it is reasonably probable any error affected the outcome of the case. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800-802.) Walsh made no attempt to show prejudice in his opening brief on appeal and he failed to file a reply brief, though the City argued that no prejudice showing had been made. Any claim of prejudice has been forfeited. (*In re Groundwater Cases*, *supra*, 154 Cal.App.4th at p. 690, fn. 18; *Badie*, *supra*, 67 Cal.App.4th at pp. 784-785.)

DISPOSITION

The trial court's order denying the petition for writ of mandate is affirmed. Respondent is awarded its costs on appeal.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.